BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE ADEA DOES NOT PREEMPT STATE LAWS PROVIDING FOR MANDATORY RETIREMENT OF STATE COURT JUDGES 5

A. The Court Of Appeals Correctly Ruled That State Judges Are "Appointees On The Policy-making Level" 10

B. Missouri Judges Are Elected To Public Office Within The Meaning Of The ADEA 15

II. APPLICATION OF THE ADEA TO STATE COURT JUDGES WOULD INFRINGE ON STATE SOVEREIGNTY IN VIOLATION OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 19

A. This Court's Decision In *Garcia v. San Antonio Metropolitan Transit Authority* Should Be Overruled 20

B. Application Of The ADEA In This Case Would Be Unconstitutional Under *National League of Cities v. Usery* 24

C. Application Of The ADEA In This Case Would Be Unconstitutional Even Under *Garcia v. San Antonio Metropolitan Transit Authority* 25

CONCLUSION 28

APPENDIX

Missouri Secretary Of State letter . . . . . App. 1
Petitioner Nugent appointment letter . . . . . App. 2
Petitioner Gregory appointment letter . . . . . App. 3

TABLE OF AUTHORITIES

Page

Cases:

Apkin v. Treasurer and Receiver General, 401 Mass. 427, 517 N.E.2d 141 (1988) 10, 22, 26, 27
Arcadia v. Ohio Power Co., ___ U.S. ___, 111 S.Ct. 415 (1990) 16
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 15
Carlson v. Green, 446 U.S. 14 (1980) 15
Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *aff'd*, ___ U.S. ___, 110 S.Ct. 2841 (1990) 12
Edward J. DeBartolo Corp. v. Florida Gulf Coast Build. and Constr. Trades Council, 485 U.S. 568 (1988) 16
EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989) 10, 14
EEOC v. Massachusetts, 680 F. Supp. 455 D. Mass), *aff'd*, 858 F.2d 52 (1st Cir. 1988) 7, 10, 11, 14, 24
EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) 10, 13
EEOC v. Wyoming, 460 U.S. 226 (1983) 20, 21, 22, 23, 24
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 20, 22, 23, 25, 26, 27
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 24
Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) 5, 7, 13, 15
Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) 12

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 20, 21
Holley v. Askew, 583 F.2d 728 (5th Cir. 1978) 25
Hooper v. California, 155 U.S. 648 (1895) 16
In re Rules of Circuit Court of Twenty-First Judicial Circuit, 702 S.W.2d 457 (Mo. 1985) 13
In re Rules of Circuit Court of Twenty-First Judicial Circuit, 757 S.W.2d 590 (Mo. 1988) 12
In re Stout, 521 Pa. 571, 559 A.2d 489 (1989) 10, 11, 12
National League of Cities v. Usery, 426 U.S. 833 (1976) 20, 21, 24
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 16
New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 9
Nichols v. City of St. Louis, 837 F.2d 833 (8th Cir. 1988) 15
Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942) 18
Pocker v. Brown, 819 F.2d 148 (6th Cir. 1978) 25
Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988) 10, 14
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 18
South Carolina v. Baker, 485 U.S. 505 (1988) 20, 23, 27
Tafflin v. Levitt, 493 U.S. ____ 110 S.Ct. 792 (1990) 8

United States v. Bass, 404 U.S. 336 (1971) 7, 8
United States v. Trans-Missouri Freight Assoc., 166 U.S. 280 (1896) 10, 11
Vance v. Terrazas, 444 U.S. 252 (1980) 15
Youakim v. Miller, 425 U.S. 231 (1976) 15

Constitutional and Statutory Provisions:

U.S. Const. amend. X 19
Mo. Const. art. V, § 5 12
Mo. Const. art. V, § 19 18
Mo. Const. art. V, § 25 . . . . . 3, 17
Mo. Const. art. V, § 26 . . . . . 3, 7
29 U.S.C. §§ 621-634 (1982 and Supp. 1987) 3
29 U.S.C. § 625 (1982 and Supp. 1987) 18
29 U.S.C. § 630(f) (1982 and Supp. 1987) 4, 17
Mo. R. Civ. P. 41-102 12
Mo. R. Crim. P. 19-36 12
Mo. Rev. Stat. § 1.010 (1988) 12
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Missouri Approved Jury Instructions (West 3d ed.) . 12
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-50

ELLIS GREGORY, JR. AND
ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

v.

JOHN D. ASHCROFT,
GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. WLF engages in litigation in a variety of areas and has been particularly active in cases which concern

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[1]Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of this Court.

misguided and overbroad applications of federal civil rights laws.

To this end WLF has filed briefs *amicus curiae* in a number of the leading Supreme Court cases involving issues of civil rights. *See, e.g., International Union v. Johnson Controls*, No. 89-1215 (decision pending 1991); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S.Ct.1997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. Weber*, 443 U.S. 193 (1979).

WLF also appeared as *amicus curiae* before this court on a number of occasions to discuss issues relating to the proper interrelationship between the national and state governments. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990); *Howlett v. Rose*, 110 S.Ct. 2430 (1990); *Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126 (1990); *United States v. Spallone*, 110 S.Ct. 625 (1990).

WLF believes that the national government and state governments have important roles to play in our federal system of government. The application of the federal Age Discrimination in Employment Act to state judges is an unwarranted intrusion into the legitimate affairs of the states that has no statutory basis and is prohibited by the Tenth Amendment to the United States Constitution.

Because of the unique perspective of WLF in its commitment to promoting a balance between state and federal rights and powers, this brief will bring relevant matter to the attention of the Court that will not be brought to the attention of the Court by other parties.

STATEMENT

The Missouri Non-Partisan Court Plan (the "Missouri Plan"), Mo.Const. art. V, § 25, is the seminal framework for the merit selection of state court judges. Petitioners are Missouri state court judges who were initially appointed and have been retained by popular election under the Missouri Court Plan. In Missouri, the merit selection system applies to judges of the Supreme Court, the intermediate court of appeals, and certain circuit courts. *Id.* Under the Missouri Plan, when a vacancy occurs on these courts the governor initially appoints a judge from a panel of candidates determined by merit screening commissions. *Id.* The appointment is always "for a term ending December thirty-first following the next general election after the expiration of twelve months in the office." *Id.*, § 25(c)(1). A judge may continue for a full term in office after his appointed term by declaring his "candidacy for election to succeed himself," and obtaining a favorable majority vote. *Id.* The judge may thereafter be reelected upon the expiration of each full term of office provided, however, that retirement at the age of seventy is mandatory. *Id.* and § 26.

Petitioners, direct beneficiaries of the Missouri Plan throughout their judicial careers, now seek to avoid the plan's mandatory retirement provision, claiming that the plan violates the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982 and Supp. 1987) ("ADEA").[2] In particular, petitioners contend they are covered employees under the ADEA, notwithstanding that the ADEA's definition of employee plainly exempts both

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[2]Petitioners also claim that the Missouri Plan as applied to them violates the equal protection clause of the fourteenth amendment. While this *amicus* views the equal protection issue as being without merit, the issue is not addressed herein as it is otherwise fully briefed.

persons "elected to public office" and "appointee[s] on the policymaking level." 29 U.S.C. § 630(f). Given (1) the absence of any intent whatsoever on the part of Congress to preempt the Missouri constitutional provisions governing that state's judges; (2) the language of the ADEA exemptions themselves; and (3) the tenth amendment guarantee of state sovereignty, petitioners' challenge to the Missouri Plan should be rejected by this Court as it has been by both the court of appeals and the district court.

SUMMARY OF ARGUMENT

By enacting the ADEA Congress did not intend to preempt state law governing selection, retention, and tenure of state court judges. Absent a clear, unequivocal manifestation of congressional intent to the contrary, provisions such as those of the Missouri Plan may not be disturbed by application of a federal statute. There is nothing in the ADEA or its legislative history upon which to base a valid finding of preemption in this area of vital importance to the states.

In addition, the ADEA's exemption of persons "elected to public office" and of "appointees on the policymaking level," 29 U.S.C. § 630(f), dictates that state court judges are not within the scope of the ADEA. State judges make policy in the course of deciding legal controversies and supervising the state judicial systems. State judges who must submit to election, moreover, whether they are initially elected or retained by election following an initial appointment, are elected officials.

Finally, the tenth amendment prohibits application of the ADEA to state court judges. To apply the ADEA would unconstitutionally infringe upon the states' sovereignty, and would contravene core principles of federalism.

ARGUMENT

I. THE ADEA DOES NOT PREEMPT STATE LAWS PROVIDING FOR MANDATORY RETIREMENT OF STATE COURT JUDGES

The issue presented by this case, which petitioners treat as a technical question of statutory construction, is in fact one of federal preemption. The question, therefore, is whether Congress, in enacting the ADEA as a whole, clearly and unequivocally manifested an intent to displace state constitutional and statutory provisions governing the selection, retention, and tenure of state court judges.

Although the court of appeals framed the issue in precisely these terms, 898 F.2d at 600, petitioners in their brief do not attempt either to make the showing required under the law of preemption or to argue that no such showing is necessary. Instead, petitioners argue that because the ADEA is a "remedial" statute, the presumptions run in favor of a "narrow construction" of the exemptions, and thus a construction of the statute as a whole that is broad enough to create a conflict with -- and preemption of -- state law. In fact, as the authority on preemption reveals, the reverse is true: far from a presumption in favor of preemption, the presumption is heavily against it, especially in matters as closely related to the traditional role of the states as those involved in this case.

The vital interest a state has in establishing its own judicial system cannot seriously be disputed. The Missouri Plan has served as a model for other states in

eliminating partisan judicial selection. Members of the public, as well as the bench and the bar, are the beneficiaries. *See, e.g.*, W. Crowdus, Twenty Years of the Missouri Nonpartisan Court Plan, J. Mo. Bar (March 1962), *reprinted in* 32 J. Mo. Bar 370 (July-Aug. 1976). Mandatory retirement, which allows for orderly attrition, furthers the overall objectives of the Missouri Plan.

Mandatory retirement lessens the incentive for judges of retirement age to "governor shop" or "commission shop" by timing their retirement to precede or follow anticipated political changes. It also avoids the unseemly prospect of judges trading retirement for other consideration such as increases in retirement pay and benefits, and reduces the likelihood of age becoming a factor, intentionally or otherwise, in reelection campaigns. It thereby furthers the overall goal of the Missouri Plan to depoliticize judicial selection and retention.

Mandatory retirement also expands opportunities for other qualified members of the bar to seek judicial posts. This facilitates the influx of fresh ideas into the judicial system, and the maintenance of a high-quality judiciary. Mandatory retirement increases opportunities for women and minorities to share in judicial appointments. Predictable judicial turnover ensures that the state judiciary can reflect more closely the present societal makeup, and facilitates the governor's ability to redress past inequities. Governor Ashcroft's recent selections for the appellate bench illustrate this: six of the last eleven appellate court judges appointed have been women, including the first woman to serve on the state's supreme court. Fourteen women or minority judges have been selected from the twenty panels submitted to the governor which contained such candidates.

Mandatory retirement also avoids arduous and often perplexing determinations as to which judges, after a certain age, are physically and mentally qualified and which are not. Without mandatory retirement, competency hearings would be necessary. This would only tend to diminish public confidence in the judiciary and expose judges to undue stress and embarrassment.[3]

Whatever weight a particular state might give these considerations in formulating that state's policy on judicial selection and tenure, it cannot be denied that they are legitimate and compelling concerns. Petitioners nevertheless would have the Court find that a function as basic to state government as establishing the framework for the state judicial system has been swept aside by Congress' enactment of the ADEA. "[I]n light of the significant intrusion into properly state-dominated affairs that such a finding would entail," it is necessary "to see if Congress clearly and unequivocally manifested an intent to regulate the requirements a state can impose on those who hold office in the state's judiciary." *EEOC v. Massachusetts*, 858 F.2d 52, 54 (1st Cir. 1988). The court of appeals in this case aptly recognized that because "the tenure of state judges is a matter of considerable importance to a state," an initial determination must be made as to whether in enacting the ADEA "Congress explicitly and unequivocally manifested its intent to preempt state law in this area." *Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir. 1990). "Unless Congress conveys its purpose clearly, it will not be deemed to have signifi-

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[3]All of this is not to say that the state underestimates the valuable contributions judges who pass the mandatory retirement age may make. In Missouri, a consenting retired judge may be assigned by the Supreme Court as a senior judge to any state court or as a special commissioner. Mo. Const. art. V, § 26(3). Thus, at the discretion of its Supreme Court, the state welcomes continued service of these judges.

cantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*

In this case there is no indication whatever, much less a clear and unequivocal manifestation, that Congress intended to displace state laws governing the selection and tenure of state judges. As petitioners themselves concede, the legislative history of the ADEA is "devoid" of any meaningful commentary in this regard. Petitioners' Brief at 18. The only real expression of congressional intent in this regard is the language of the exemptions, which by their terms and existence show that Congress actually sought to avoid any conflict with state law.

The legislative history petitioners cite is of virtually no value in resolving the issues in this case. They argue that the legislative history of Title VII should be unblinkingly applied in the absence of ADEA legislative history simply because definitional text from Title VII was used in the ADEA. This Court unanimously rejected a similar argument in *Tafflin v. Levitt*, 493 U.S. ___, 110 S.Ct. 792, 797 (1990), in which it refused to apply its interpretation of the Clayton Act to the RICO statute merely because the two acts contain similar language. The "'mere borrowing of statutory language does not imply that Congress intended to incorporate all of the baggage that may be attached to the borrowed language.'" *Id.* (citation omitted).

The Title VII history upon which petitioners rely, Petitioners' Brief at 18-21, involved legislation dealing with discrimination on the basis of race, sex, and religion,

so the question of mandatory retirement was not involved. When the Title VII definition of "employee" was incorporated in the ADEA, moreover, even the ADEA did not implicate that question, because the ADEA at that time was inapplicable to employees over 65 years of age. Congress, therefore, did not consider the potential impact of the ADEA on the mandatory retirement provisions of state law when it adopted the ADEA's definition of "employee." "Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action." *New York State Dep't. of Social Serv. v. Dublino*, 413 U.S. 405, 417 (1973).

It is important to bear in mind that mandatory retirement is not all that is at stake in this case. If the ADEA applied to state judges, it would apply even to their initial selection, and to their retention by the voters. It is highly unlikely Congress intended that unsuccessful candidates for state court judgeships could invoke the power of the federal courts to challenge an appointing authority's selection of younger judges or the electorate's refusal to retain a particular judge. That result, however, is the logical consequence of petitioners' argument.

The purpose of the ADEA's exemptions was to avoid exactly the type of conflict with state law that petitioners urge the Court to find in this case. If Congress had intended that judicial appointments, retention, and tenure be subject to the ADEA, there would be some hint of that intent in the statutory language or the legislative history. If Congress had intended to preempt the laws of the numerous states whose constitutions or statutes provide for mandatory retirement of state court judges, it would have said so.

A. The Court Of Appeals Correctly Ruled That State Judges Are "Appointees On The Policymaking Level"

The issue addressed by both courts below is whether petitioners are "appointee[s] on the policymaking level." Several state and federal courts also have addressed this question. *See EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141 (1988). Consistent with the decisions below, the courts in *Massachusetts*, *Illinois*, and *Stout* have ruled that judges are "appointees on the policymaking level." The *Apkin* court did not decide the policymaking issue, but nevertheless concluded that the ADEA does not extend to state judges. This leaves only the *Vermont* and *Schlitz* decisions as judicial support for the strained reading of the ADEA that is now urged on this Court by petitioners. *Schlitz* is particularly poor support, for from the two *Schlitz* opinions, petitioners can find solace in only a single conclusory sentence of a footnote of the district court opinion, asserting without analysis that state judges are not policymakers. 681 F. Supp. at 331. n.1.

In *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 280 (1896), this Court stated:

> *The public policy of the government is to be found* in its statutes, and when they have not directly spoken, then *in the decisions of the courts* and the constant practice of the government officials.

Id. at 340 (emphasis added); While "policymaking" is often used to describe "an aspect of the functions of high-level executive and legislative officers...," *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass.), *aff'd*, 858 F.2d 52 (1st Cir. 1988), it is nevertheless clear that:

> "policymaking" is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents. . . . Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges (including trial judges).

680 F. Supp. at 462.

The policymaking role of a state supreme court is addressed further in *In re Stout*, where the Pennsylvania attorney general brought a *quo warranto* proceeding to remove an appointed justice of the Supreme Court who had during her appointive term reached the mandatory retirement age of 70. In refusing to apply the ADEA the court noted:

> As can be seen we are charged with charting a definite course of action for the judiciary, and to select our method of action from various alternatives at hand and in light of these conditions to guide and determine the present and future course of this branch of government. It cannot be seriously argued that this is not policymaking, for as our Attorney General pointed out during his

> well-reasoned argument on the subject, our policymaking power is vast indeed. Having so concluded, we find no vitality in the Respondent's argument.

559 A.2d at 497.

Lest it be thought that the idea of judges making policy is an abstraction without application in the state of Missouri, it should be noted that Missouri by statute prescribes that court decisions can establish the common law. Mo. Rev. Stat. § 1.010 (1988). Indisputable examples of judicial policymaking are found in recent Missouri court decisions. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *aff'd*, ____ U.S. ____, 110 S.Ct. 2841 (1990) (ruling that parents or other legal guardians lack authority to decline nourishment on behalf of a comatose person); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (rejecting the "last clear chance" doctrine and judicially adopting the Uniform Comparative Fault Act as the law of Missouri). The members of the Supreme Court are empowered to establish rules of conduct for the state's judiciary and bar, Mo. Const. art. V, § 5, promulgate rules governing practice and procedure in the Missouri courts (*see, e.g.*, Mo. R. Crim. P., 19-36; Mo. R. Civ. P. 41-102), and fashion mandatory pattern jury instructions, Missouri Approved Instructions-Criminal (Mo. Sup. Ct. Pub. 3d ed.); Missouri Approved Jury Instructions (West 3d ed.). Inferior state courts create local rules that further govern practice before those courts. *E.g.*, Missouri Western District Court of Appeals Special Rules, *reprinted in* Missouri Rules of Court (West 1991); Rules of the Twenty-First Judicial Circuit of Missouri, *reprinted in* Missouri Court Rules Handbook (Butterworth Issue 4 1990). The Supreme Court also is the arbiter of disputes within the Missouri judicial branch. *See, e.g., In re Rules of Circuit Court of Twenty-First Judicial Circuit*, 757 S.W.2d 590 (Mo. 1988); *In re Rules of Circuit Court of Twenty-First Judicial Circuit*, 702 S.W.2d 457 (Mo. 1985). Thus, both in deciding cases before them and in supervising the judicial system, Missouri judges make policy,[4] a fact that was recognized and thoroughly considered by the court of appeals. 898 F.2d at 601-02.

Petitioners assert that the exemption for policymaking appointees should be limited because it is found among other exemptions that apply primarily to the executive and legislative branches of government. As the court of appeals observed, however, 898 F.2d at 603, that argument leads to the illogical result that *none* of the four categories of exemptions from coverage of the ADEA would apply to employees in the judicial branch in states where judges are appointed. This construction of the ADEA is implausible.

Petitioners rely primarily upon *Vermont*, in which the Second Circuit ruled that the exemption applies only to appointees "working closely with the elected officials who appointed them." 904 F.2d at 798. Adoption of that ruling, however, would effectively preclude the judicial branch of government in any state from qualifying for the exemption, as appointed judges do not work closely with

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[4] "Policymaking" has been defined in common parlance as the act of elaborating policy, as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions," or as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." Webster's Ninth New Collegiate Dictionary at 910 (1985 Edition). Courts clearly meet these definitions in their policymaking activities. Judges, whether state or federal, appointed or elected, often elaborate upon policy considerations, regularly choose among alternatives in making decisions, and routinely make conclusions as to desirable goals and procedures. These actions have an impact not only on litigants before the court, but on all persons within the court's jurisdiction.

the appointing authority. But there is no indication in the ADEA, in its legislative history, or in other sources that Congress intended to exempt only executive and legislative policymakers. On the contrary,

> . . . Congress did not strictly limit the exception to policymakers, but rather applied it to all those "*at a policymaking level*." This appears to be a somewhat more flexible standard, which requires us to look at the position of the appointees within government structure, and not so much at the particular duties of the persons involved.

Massachusetts, 858 F.2d at 56 (emphasis added); *see also Illinois*, 721 F. Supp. at 159 ("Absent an express Congressional intent to limit the exception to the legislative and executive branch, a rational reading must include high ranking state officials in all these branches").

Schlitz, the other case upon which petitioners principally rely, is equally unpersuasive. In that case the state's mandatory retirement law had not been invoked; instead, the legislature had simply failed to reappoint the plaintiff judge. The district court conducted no analysis of the policymaking exemption, 681 F. Supp. at 331 n.1, and the court of appeals found it unnecessary even to reach the question, holding that the legislature's decision was immune from review under the ADEA. 854 F.2d at 44-46.

The narrow construction of the policymaking exemption for which petitioners argue is not supported by statutory language, legislative history, persuasive legal authority, or even the common meaning of "policymaking." It should be rejected.

B. Missouri Judges Are Elected To Public Office Within The Meaning Of The ADEA

In addition to his argument that petitioners are policymakers within the meaning of the ADEA, respondent argued in the district court that petitioners are also exempt from the provisions of the ADEA because they are elected officials. In a footnote, the district court disagreed with that argument. *Gregory v. Ashcroft*, No. 88-0221C(3) (July 14, 1989) at n.1, *reprinted in* Petition at A-17 to A-26. Respondent did not cross-appeal on that point, but urged the elected official exemption as an alternative ground of affirmance. Eighth Circuit Brief of Respondent at 20-21.[5] The court of appeals did not reach the issue, although it indicated its inclination to disagree with the district court's statement. 898 F.2d at 600. The issue, however, may be reached by this Court as an alternative ground for affirming the decision below.[6]

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[5]It is doubtful that there was any actual requirement, and possibly no basis, for respondent to cross-appeal, since it does not appear that the district court's comments concerning the elected official exemption served in any way as a decisional basis for its dismissal of petitioners' claim. It thus was proper for respondent simply to urge the elected official exemption as an alternate ground for affirmance by the Eighth Circuit. *See, e.g., Nichols v. City of St. Louis*, 837 F.2d 833, 835 (8th Cir. 1988) (court of appeals may affirm district court judgment on any ground supported by the record).

[6]It is particularly true in cases coming from the federal courts that this Court may consider a matter not specifically passed upon by the court below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). It is prudent to do so when the issue at hand is of a nature such that it will likely recur and a decision by the Court will serve the interests of judicial administration. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Most recently, the Court has been willing to construe a federal statute in a manner not con-

(continued...)

Judges selected pursuant to the Missouri Plan are "elected officials" within the meaning of the ADEA. After serving an initial term of office, a Missouri Plan judge may become a candidate for election to succeed himself. The name of the judge is then submitted to the voters at the next general election. If a majority votes for retention, the judge may remain in office until the expiration of another term, at which time he may again submit his name for retention. If the voters vote not to retain the judge, a vacancy exists which is filled by appointment.

Petitioners argue that they do not fall within the elected official exemption because they are initially appointed, not elected to office, and because judges have no opposition in retention elections. Neither argument has merit. There is nothing in the ADEA to suggest that an official's initial entry into public office must be by election for the elected official exemption to apply. Nor is there any suggestion that an official is "elected" only if the election is contested. To imply such a requirement, moreover, would lead to absurd results. For instance, in a locale where one political party happens to predominate, the candidate of that party may find himself unopposed in the election. If petitioners' reading of the ADEA were correct, any such candidate, irrespective of the office

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[6](...continued)
sidered by the court of appeals or addressed by the parties. *Arcadia v. Ohio Power Co.*, 111 S.Ct. 415, 418 (1990). And where, as in this case, a serious constitutional issue would confront the Court absent statutory grounds for decision, *see infra* § II (tenth amendment violation), the Court has strongly favored consideration of all potentially dispositive statutory matters. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582-83 (1979). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Build. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

involved, would be outside the ADEA's elected official exemption simply because there was no opposing candidate on the ballot.[7] The ADEA merely states that it does not apply to persons "elected to public office in any State or political subdivision of any State by the qualified voters thereof . . ." 29 U.S.C. § 630(f). When the statute is applied in accordance with its plain terms, there is no doubt that petitioners are exempt.

Petitioners' initial appointments were for limited terms which have long since expired. According to certified copies of letters of appointment, petitioner Gregory was appointed in December 1978 and petitioner Nugent was appointed in December 1980. Appendix at 1-3. Both appointments were effective "for a term ending December 31st following the next general election after the expiration of twelve months . . . ." *Id.* Thereafter, to remain in office, petitioners were required to "declare *candidacy for election* to succeed [themselves] . . . ." Mo. Const. art. V, § 25(c)(1) (emphasis added). Petitioner Nugent was retained by election in 1982. Official

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[7]In actuality, judges placed before the electorate for retention do have opposition. Their opposition is the entire pool of persons qualified for judicial appointment. The voters may well decide that they prefer whoever the appointing authority might select to replace the judge who appears on the ballot. It is not a matter of supposition that voters can refuse to retain a judge. Research discloses that one Missouri judge has been voted out of office. R. Watson and R. Downing, The Politics of the Bench and Bar--Judicial Selection Under the Missouri Nonpartisan Court Plan at 225 (1969). In 1986, the entire nation followed the heated and expensive election campaign in which the chief justice and two other justices of California's supreme court were removed by the voters. Disproving the political adage that "you can't beat somebody with nobody," Californians chose "none of the above." A judge who faces the voters for retention is like any other incumbent whose name is on the ballot. Either can lose his office at the election of the people. They are elected officials in the practical sense of that term, and no rational distinction can be made for purposes of the ADEA.

Manual State of Missouri at 1335 (1983-84) (November 2, 1982 general election returns). Petitioner Gregory was retained by election in 1980, 1984, and 1988. Official Manual State of Missouri at 1281 (1981-82) (November 4, 1980 general election returns); Official Manual State of Missouri at 1297 (1985-86) (November 6, 1984 general election returns); Missouri Roster at 142 (1989-90) (November 8, 1988 general election returns).[8] Petitioners declared their candidacy for election and a total of four times have been "elected to public office." Having sought the people's vote, they are in a poor posture to deny they were elected to public office.

The Equal Employment Opportunity Commission ("EEOC"), the federal agency that enforces the ADEA, 29 U.S.C. § 625, agrees with this interpretation of the "elected official" exemption. Agency interpretations are entitled to considerable weight when a court considers the meaning of a statute. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n. 17 (1942). They are persuasive because they represent the "view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Id.*

In response to a request from Congressman Pepper for an opinion on the applicability of the ADEA to appointed state court judges, the EEOC stated:

> Based on a thorough consideration of the exclusion and of the legislative history associated with

[8]Upon retention by election, petitioner Nugent, a judge of the court of appeals, and petitioner Gregory, an associate circuit court judge, have twelve- and four-year terms of office respectively. Mo. Const. art. V, § 19.

> it, the Commission is of the view that a state or local court judge who is elected by the general electorate or who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.'

April 7, 1987 Letter to Rep. Claude Pepper, *reprinted in* EEOC Compliance Man. at N:1001, n.2 (BNA). The EEOC's letter makes clear the agency's view that judges such as petitioners are "elected officials" under the ADEA. This conclusion is not altered by the fact that a judge may initially be appointed. It is the elective nature of their posts after appointment which is significant, and which ultimately distinguishes these judges as "persons elected to a public office."

II. APPLICATION OF THE ADEA TO STATE COURT JUDGES WOULD INFRINGE ON STATE SOVEREIGNTY IN VIOLATION OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The position advocated by petitioners poses a serious threat to the rights of the state of Missouri and, indeed, to all states. It is difficult to identify a matter more properly left to the states than establishment of the qualifications for service in the state judiciary. If federal intrusion into this vital state function can be justified, virtually no aspect of a state's sovereignty is secure. The Bill of Rights provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Nowhere in the Constitution is any aspect of the power to regulate state

judiciaries delegated to the federal government or prohibited to the states. If the tenth amendment has any meaning, or if any of the meaning it has lost is to be restored, petitioners' claims must be rejected.

As demonstrated, *supra*, the Court would have every reason to conclude on grounds short of reaching this constitutional question that the ADEA does not apply to petitioners or persons similarly situated. However, should the Court be persuaded that Congress clearly intended a sweeping preemption of state law in enacting the ADEA, the Court's inquiry is not at an end. Petitioners strike at the core principles of federalism upon which our nation and its government were founded. For petitioners to succeed, the Court must conclude that the tenth amendment does not protect a state's interest in its own judiciary; and that Congress is better equipped to dictate to the states how this function should be performed. Because such an outcome would be so completely repugnant to our federal system, petitioners cannot be allowed to prevail.

A. This Court's Decision In *Garcia v. San Antonio Metropolitan Transit Authority* Should Be Overruled

There has been considerable recent debate over Congress' power to regulate state and local government actions. Much of that debate has taken place within this Court. *See South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976). The issue of state sovereignty raised by these cases has engendered conflicting opinions among

individual members of the Court. The holdings themselves illustrate the volatility of the issue.

In *National League of Cities*, the Court defined the limits the tenth amendment places on congressional power to regulate the activities of state and local governments. 426 U.S. at 841. Two years later in *Hodel*, those limits were summarized as follows:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; quoting *National League of Cities*). The Court further stated:

> Demonstrating that these three requirements are met does not . . . guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.

Id. at 288 n.29 (citations omitted).

Subsequently, the Court held in *Wyoming* that application of the ADEA to state and local governments

"was a valid exercise of Congress' powers under the Commerce Clause." 460 U.S. at 243. The majority, ostensibly acting in accordance with *National League of Cities*, reasoned with respect to a state retirement provision governing game wardens that the ADEA did not "'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'" *Id.* at 239.

In actuality, the result reached by the majority ran "afoul of the three prongs of the *National League of Cities* test. . . ." *Id.* at 258 (Rehnquist, J., dissenting). The dissent thoroughly analyzed the relation of the ADEA to the state retirement provision then at issue, and rightly concluded that the ADEA should not have been applied against the state of Wyoming. This analysis is of equal moment to the tenth amendment issue in the present case. As the Chief Justice stated, "[n]othing in the Constitution permits Congress to force the states into a Procrustean mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." *Id.* at 265 (Rehnquist, J. dissenting).[9]

In 1985, the same majority which began the erosion of *National League of Cities* in *Wyoming* overruled *National League of Cities* outright. *Garcia*, 469 U.S. 528. The majority's primary stated basis for rejecting *National League of Cities* was a purported difficulty in defining "traditional governmental functions." 469 U.S. at 538.

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[9]*Wyoming* should not, as petitioners assume, be casually read to bring this case under the purview of the ADEA. *Wyoming* stands only for the proposition that the ADEA may apply to some state employment situations, *Apkin*, 517 N.E.2d at 143, and the officials in that case were game wardens, not judges. There is no indication that the Court contemplated in *Wyoming* that state judges would seek to avoid the operation of state law under the ADEA.

Ironically, this majority had encountered no such difficulty in *Wyoming*, disposing of the "traditional governmental function" issue in a single sentence: "The management of state parks is clearly a traditional state function." 460 U.S. at 239. Nevertheless, the *Garcia* majority rejected the principle of judicial protection of state sovereignty and held that state sovereignty is adequately protected by "the national political process." 469 U.S. at 555.

The result of the *Garcia* holding is that the members of Congress "are the sole judges of the limits of their own power." *Id.* at 567 (Powell, J., dissenting). *Garcia* nevertheless was reaffirmed in *Baker*, 485 U.S. 505, in which the same majority held that "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." 485 U.S. at 513 (emphasis in original).

As observed by Justice O'Connor, *Garcia* and *Baker* represent an abandonment of the "constitutional role" of the Court because it "failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution." *Baker*, 485 U.S. at 533-34 (O'Connor, J., dissenting). The Chief Justice has forecast that the time will come for the principle of state sovereignty to be revitalized. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). The Court should take this opportunity to overrule *Garcia* and resume its constitutional role.

B. Application Of The ADEA In This Case Would Be Unconstitutional Under *National League of Cities v. Usery*

Under the abandoned *National League of Cities* analysis, the ADEA as applied to state court judges would violate the tenth amendment. First, the ADEA regulates the "states as states." *Wyoming*, 460 U.S. at 237. Second, as applied in the manner urged by petitioners, it addresses an "undoubted attribute of state sovereignty." As the First Circuit observed in *Massachusetts*:

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very closely to the heart of state sovereignty.

858 F.2d at 54. Third, the management and regulation of the court system is a "traditional governmental function." *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (administration of justice by the states is a "primary governmental function").

There is no federal interest in applying the ADEA to state court judges that "justifies state submission." *National League of Cities*, 452 U.S. at 288 n. 29. Even assuming that there is some federal interest in prohibiting mandatory retirement of state judges, that interest is certainly not a compelling one. If it were, Congress would not have explicitly left states with the option of imposing mandatory retirement on judges under the "elected official" exemption. Given this exemption for "elected officials," every state judge in the United States could be subject to mandatory retirement if every state

were to adopt election as its sole method of selecting judges.[10]

Application of the *National League of Cities* test will rarely provide as well-defined an answer to issues of state sovereignty as it does in this case. Difficulty of application, however, is an insufficient reason for the Court to abandon the approach in favor of that in *Garcia*, which relies on Congress' "underdeveloped capacity for self-restraint" as the states' only protection of their sovereign interests. *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

C. Application of the ADEA in This Case is Unconstitutional Even Under *Garcia v. San Antonio Metropolitan Transit Authority*

Should the Court decline at this juncture to reexamine *Garcia*, the Court nevertheless should find that application of the ADEA to appointed state court judges is invalid

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[10]While some may contend that this is only a theoretical possibility, there exists a real probability that application of the ADEA to appointed judges would create an incentive for many states to change their current methods of selecting judges. For instance, a state which appoints all of its judges may determine that its interest in controlling judicial tenure is more important than any method of judicial selection. That state could maintain its mandatory retirement provisions for judges by changing its method of selection from appointment to election. If this were to occur, the only effect of the ADEA's application would be to force the state to change its method of judicial selection. Obviously, such a result would not serve any purpose for which the ADEA was enacted. There is no identifiable federal interest in influencing the states' choice of how judges are selected. *Cf. Pocker v. Brown*, 819 F.2d 148 (6th Cir. 1987); *Holley v. Askew*, 583 F.2d 728 (5th Cir. 1978) (both cases rejected constitutional challenges to state provisions for appointment rather than election of judges).

even under the "national political process" analysis applied in *Garcia*.

Petitioner's argument that appointed judges are not exempted from the coverage of the ADEA relies, at best, on congressional ambiguity. The ADEA does not define a "policymaker" or contain a definition of what constitutes the "policymaking level." There is neither a mention of judges nor a differentiation between elected and appointed judges within the ADEA. Indeed, there is no indication that Congress even considered application of the ADEA to appointed state court judges.

> [T]he conclusion is inescapable that, if Congress had contemplated the matter, it would have exempted all State judges from the ADEA. Nothing in the legislative history of the 1986 amendment indicates that Congress intended the amendment to apply to judges, and certainly there is nothing to indicate that Congress intended the amendment to apply to some State judges and not to others. The more closely the statute is examined, the more unavoidable becomes the conclusion that this anomaly is a product of congressional inadvertence.

Apkin, 517 N.E.2d at 145.

To accept petitioners' construction of the ADEA would result in the invalidation of a substantial number of states' mandatory retirement provisions as applied to appointed judges. It would expose appointing officials of the states to suit under the ADEA by any potential appointee who may claim that he was not appointed due to his age. Absent a clear and unequivocal statement of congressional intent to visit such a drastic imposition upon the states, this interpretation would not only violate

the preemption doctrine, but would also reflect a glaring defect in the national political process:

> Congress's deliberate choice should be expressed in a clear statement of intent when a federal statute impinges on areas that implicate State sovereignty as intimately as the structure of a State's judicial branch. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relie[s] to protect states' interests."

517 N.E.2d at 144-45 (quoting L. Tribe, *American Constitutional Law* § 6-26, at 480 (2d ed. 1988) (emphasis in original)).

This follows from even the most restrictive reading of *Garcia*. As Justice Scalia maintained in his concurrence in *Baker*, however, there are, despite the trend launched by *Garcia*, "affirmative limits *the constitutional structure* might impose on federal action affecting the States . . . ." 485 U.S. at 528 (Scalia, J., concurring) (emphasis in original). While the Court has not identified what those limits might be, there can be no doubt that some substantive constraints still exist in deference to state sovereignty. Those constraints are certainly reached when Congress attempts to control the states' judicial systems. There are limits to federal power, and petitioners would carry us beyond them.

Application of the ADEA to appointed judges "would produce a helter-skelter, irrational pattern throughout the country." *Apkin*, 517 N.E.2d at 146. The Court can prevent such an irrational, unintended, and unconstitutional result by holding that all state court judges, appointed and elected, are exempt from the provisions of the ADEA by

virtue of the tenth amendment. Such a holding would provide consistency and fairness among and within the states, regardless of their method of judicial selection. Perhaps more importantly, such a holding would address meaningfully the impropriety of applying a federal statute so as to thwart the states' exercise of control over primary functions of the states. Most importantly, such a holding would allow the Court to reassume its vital and proper role in safeguarding the principles of federalism embodied in the Constitution.

CONCLUSION

For the reasons stated herein, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Daniel J. Popeo
John C. Scully
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

John C. Cozad*
W. Dennis Cross
R. Christopher Abele
MORRISON, HECKER, CURTIS, KUDER & PARRISH
1700 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106-2370
(816) 842-5910

**Counsel of Record*

February 15, 1991

APPENDIX

STATE OF MISSOURI
ROY D. BLUNT
SECRETARY OF STATE

I, ROY D. BLUNT, Secretary of State of the State of Missouri, and Keeper of the Great Seal thereof, hereby certify that the annexed pages contain a full, true and complete copy of the letters of appointment for Anthony P. Nugent, Jr., Douglas William Greene, Flake L. McHaney, and Ellis Gregory, Jr. as the same appears on file and of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this 7th day of February, A.D., 1991.

ss/Roy D. Blunt
Secretary of State

App. 2

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

Joseph P. Teasdale
Governor

December 23, 1980

SECRETARY OF STATE

Sir:

I have the honor to advise that I have this day made the following appointment:

Anthony P. Nugent, Jr., 655 West 61st Terrace, Kansas City, Jackson County, Missouri 64113, as Judge of the Missouri Court of Appeals, Western District, for a term ending December 31st following the next general election after the expiration of twelve months in said office. Vice: Judge Ben W. Swofford, retired, effective December 28, 1980.

Please issue Commission accordingly.

Respectfully submitted,

ss/Joseph P. Teasdale
Governor

ATTEST:

Secretary of State

App. 3

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

Joseph P. Teasdale
Governor

December 22, 1978

SECRETARY OF STATE

Sir:

I have the honor to advise that I have this day made the following appointment:

Ellis Gregory, Jr., 5132 Crosswood Drive, St. Louis County, Missouri, as Judge of the Magistrate Court, District 13, St. Louis County, Missouri, effective immediately; for a term ending December 31st following the next general election after the expiration of twelve months in said office.

Please issue Commission accordingly.

Respectfully submitted,

ss/Joseph P. Teasdale
Governor

ATTEST:

Secretary of State